

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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METRO INDUSTRIAL PIPING, INC.,

Plaintiff-Appellant,

v

HADEN, INC.,

Defendant-Appellee.

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UNPUBLISHED

May 3, 2002

No. 221982

Macomb Circuit Court

LC No. 97-005084-CK

Before: Whitbeck, C.J., and Markey and Kelly, JJ.

PER CURIAM.

Plaintiff Metro Industrial Piping, Inc., appeals as of right the trial court's order granting defendant Haden, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

**I. Basic Facts And Procedural History**

This case involves a contract dispute arising out of a construction endeavor known as the Chrysler Corporation Warren Truck Assembly Plant Powder Anti-Chip System Project (the project). In March 1996, Haden hired Metro as a subcontractor to begin mechanical work on the project under a \$1,000,000 contract. Between the contract bidding process and the date that Metro began working on the project, Haden gave Metro a purchase order including Haden's and Chrysler's terms and conditions. Subsection 3.1 of Haden's terms and conditions provided that

it is understood and agreed that the written acceptance by Seller (Metro) of this purchase order or the commencing of any work or the performance of any services hereunder by Seller shall constitute acceptance by Seller of this purchase order and of all of its terms and conditions, and that such acceptance is expressly limited to such terms and conditions.

According to subsection 3.2, "[a]ny objections or questions pertaining to the order must be raised before acceptance hereof by Seller." Anticipating that costs might change over the course of the project as unanticipated work was required, subsection 20.1 provided a procedure by which Metro would submit claims to Haden's project manager within five days of the circumstances necessitating additional expenditures; if Metro did not submit a claim within five days, it would be "waived." Further, subsection 30.5 stated that "[t]he acceptance of the final payment shall be

held to be a waiver of any and all claims against . . . Haden arising out of, or in connection with the contract.”

Metro performed the work required and received the fixed payment according to the contract. Metro then attempted to secure payment from Haden for the extra work it performed on the project. Haden denied Metro’s claims for additional payment, but agreed to return to Metro part of what it had retained under the contract in exchange for a release. The release stated that Metro waived and relinquished “all liens, claims of liens, or claims of any nature” “for labor, materials or machinery furnished” or used for the project. The release also certified that Metro had received the full contract price, “other good and valuable consideration,” and had “been paid in full as of the date hereof.”

In October 1997, Metro filed a complaint for breach of contract, alleging that Haden had breached the contract by failing to pay it the extra costs and expenses it had incurred because of Haden’s nonconformance with the project schedule and increased delays. As a result, Metro claimed to have suffered damages in excess of \$900,000. Haden subsequently moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the release barred Metro’s claims. After a hearing on the motion for summary disposition, the trial court took the matter under advisement for several months. The trial court then issued a written opinion and order denying Haden’s motion for summary disposition. The trial court reasoned that unresolved issues of material fact existed regarding whether Haden misrepresented the nature of the release given that the title to the document indicated that it was a waiver of mechanic lien rights, yet contained a single clause that waived all of Metro’s rights. The trial court also determined that the disparity between the retainage amount paid and the \$900,000 Metro sought as damages raised questions of fact concerning the document Metro believed it was signing. Accordingly, the trial court denied Haden’s motion for summary disposition.

Approximately one year later, in March 1999, Haden filed a renewed motion for summary disposition pursuant to MCR 2.116(C)(7). Haden argued that, under the terms and conditions of the contract Metro accepted when commencing work for the project, Metro waived any claims for additional costs and expenses when it failed to submit a claim as required by subsection 20.1 and when it accepted final payment for the project as determined in subsection 30.5. Following a hearing on this renewed motion, the trial court took the matter under advisement, but extended discovery an additional ninety days.

In June 1999, the trial court issued an opinion and order granting Haden’s renewed motion for summary disposition. It concluded that the terms and conditions of the contract bound Metro because Metro commenced work on the project without objecting to the terms at issue in this case. Because Metro waited six months after completing its work on the project, it was subject to the waiver in subsection 20.1. Further, a recent deposition left no question that Metro fairly and knowingly signed the release and received adequate consideration in the amount of \$21,000 because Haden was not under any obligation to return the retainage if the work was not complete. Additionally, the trial court also found that whether the release was valid was not dispositive in the case because Metro’s decision to accept the \$21,000 check constituted final payment and a waiver of all claims against Haden under subsection 30.5. Accordingly, the trial court granted Haden’s motion.

Metro raises five issues in this appeal related to the terms of its contract with Haden and the circumstances surrounding the release. Because our resolution of the release issue is dispositive in this case, it is the only issue we address.

## II. Standard Of Review

Appellate courts review de novo a trial court's decision to grant a motion for summary disposition.<sup>1</sup>

## III. Legal Standards

MCR 2.116(C)(7) permits a trial court to dispose of a claim summarily if “[t]he claim is barred because of release . . . .” MCR 2.116(G)(2) allows, but does not require, a party moving for summary disposition under subsection (C)(7) or a party opposing such a motion to submit documentary evidence in support of the party's position.<sup>2</sup> However, if the grounds for the motion “do not appear on the face of the pleadings,” the party moving for summary disposition must submit supporting documentary evidence, including affidavits, depositions, and admissions.<sup>3</sup> Once the trial court receives any documentary evidence in support of or opposing the motion, it must<sup>4</sup> consider the evidence “to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.”<sup>5</sup> “If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.”<sup>6</sup> Because our review is de novo, we engage in this same analysis of the evidence that the trial court conducted to determine whether the trial court erred in granting the motion for summary disposition.

## IV. The Release

Metro claims that Haden did not offer consideration for the release. Instead, Haden merely offered to pay money it already owed Metro but had retained to ensure that Metro completed its work on the project. Metro also argues that unresolved questions of fact existed concerning whether it knowingly and intentionally released all its claims against Haden because Haden misrepresented the substance of the release by entitling it a “waiver of mechanic lien rights.” Consequently, according to Metro, the release did not bar this action.

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<sup>1</sup> *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

<sup>2</sup> See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

<sup>3</sup> MCR 2.116(G)(3)(a).

<sup>4</sup> MCR 2.116(G)(5).

<sup>5</sup> MCR 2.116(G)(6).

<sup>6</sup> MCR 2.116(I)(1).

Nevertheless, as Haden points out, Michigan adheres to a tender-back rule relating to consideration given for a release.<sup>7</sup> In brief, a plaintiff who accepts the consideration offered for a release must tender that consideration back to the party who gave it in order to repudiate the release.<sup>8</sup> Without tendering the consideration and repudiating the release, a plaintiff has no right to sue for monetary damages for claims the release covers, even if the plaintiff believes that the consideration for the release is inadequate.<sup>9</sup> A plaintiff can only satisfy this tender rule by returning the consideration before or at the same time the plaintiff sues because tender is a “precondition.”<sup>10</sup> In this case, Haden gave and Metro received more than \$21,000 in exchange for the release, which Metro had to return to Haden before it could sue, even if this amount was inadequate. There is no question from the record that Metro failed to tender this money to Haden before commencing this action. Nor is there any question regarding whether Metro’s claims fall outside the release’s scope, given the all-encompassing language used in the release. Thus, unless an exception to the tender rule applies to this case, summary disposition was appropriate.<sup>11</sup>

“Under Michigan law, a plaintiff is excused from the tender-back requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution.”<sup>12</sup> There is no evidence that Haden ever waived Metro’s duty to return the money given in exchange for the release; in fact, Haden insists that this tender-back rule controls the outcome of this case. Metro, however, does claim that Haden committed fraud when executing the release.

Metro presents several pieces of evidence that it alleges establishes a question of material fact concerning whether the release was a product of fraud. First, the title of the release referred to waiving Metro’s rights to mechanics liens, but the subject matter of the release embraced all of Metro’s potential claims regarding the project. Second, this title was in capital letters and underlined, distracting from the substance of the release. Third, the amount of consideration Haden gave Metro for the release was vastly smaller than the amount Metro claimed Haden owed it, which it continued to expect to be paid. Fourth, Haden’s representatives never told Metro’s president, Steven Lowe, that he would have to release Metro’s rights before being able to claim the amount Haden had retained. However, when Lowe went to pick up the check, he was told that he had to sign the release before he could take the check. Fifth, Lowe did not contemplate the language of the release because he skimmed it and signed it on the spot. Sixth, Lowe believed that he was simply giving up Metro’s rights to file mechanics liens, which had already expired.

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<sup>7</sup> See *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990).

<sup>8</sup> *Id.* at 159.

<sup>9</sup> *Id.* at 167-168, 169.

<sup>10</sup> *Id.* at 170.

<sup>11</sup> See *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000).

<sup>12</sup> *Id.*, citing *Stefanac*, *supra* at 165.

This evidence, however, does not create a question of material fact concerning any fraudulent conduct by Haden. This evidence demonstrates that Lowe read the release and knew that Metro was *giving up* rights, not that Lowe believed that Haden had come to agree with Metro regarding the amount allegedly owed to the subcontractor and was making a payment toward that amount due. There is nothing intrinsically confusing about the type style or size on the release; both the title and text of the release are rendered in easily readable type. The language of the release does not use ambiguity or other artifice to disguise its effect on Metro's rights. Indeed, Lowe did not claim that the release was written in an incomprehensible manner or that he was actually unable to read it. Rather, he claimed only that he chose to read the release and sign it quickly, perhaps without adequate contemplation. Further, no reasonable person could draw a suspect inference from the fact that Haden insisted that Metro sign the release before giving Lowe the consideration for releasing Metro's rights. While Lowe may not have been sure about all the implications of the release, he cannot point to any conduct on the part of Haden that had the effect of deceiving him, much less that was intended to deceive him about the release.<sup>13</sup> This exception did not excuse Metro from returning the consideration for the release to Haden before commencing this suit. Hence, the trial court properly granted Haden's renewed motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck  
/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly

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<sup>13</sup> See *Paterek*, *supra* at 450-451.